UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

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CHARLES WEPNER, a/k/a CHUCK WEPNER,

Plaintiff,

v.

SYLVESTER STALLONE,

Defendant.

Civil Action No. 03-6166(KSH)
Argument Date: March 22, 2004

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT PER FED. R. CIV. P. 12(b)(2 and 6)

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PRELIMINARY STATEMENT

Defendant Sylvester Stallone files this brief in support of his motion to dismiss the Complaint of plaintiff Charles "Chuck" Wepner. Plaintiff alleges that defendant is using plaintiff's name and likeness to promote the "Rocky" films and related merchandise. Plaintiff sues now to 'claim his piece of the pie' from what he calls the "Rocky Franchise", as well as for certain 'promises' of work on other joint projects he claims defendant has made 'over the years'.

The Complaint should be dismissed for any one of several fatal deficiencies. First, the Complaint fails to allege facts that support *in personam* jurisdiction over plaintiff. It would offend traditional notions of due process to 'hail defendant into court' here on the insubstantial grounds pleaded in the Complaint. Plaintiff identifies only a single, specific contact between himself, defendant, and this jurisdiction. That was an unscheduled meeting between the parties over six years ago while defendant was acting in the movie "Copland", then being filmed in New Jersey. Plaintiff showed up at the set unannounced, and now alleges that defendant made a general statement about future opportunities. "Copland" itself has nothing to do with plaintiff's claims; nor does plaintiff allege that his claims are in any way related to "Copland." Rather, plaintiff alleges generally that defendant participates in promotional activities for the "Rocky Franchise". Yet, there is no allegation that these alleged promotional activities have any specific relationship to this jurisdiction. Thus, the Complaint fails to allege any basis for this Court to assert jurisdiction over defendant on any recognized basis.

Second, even if the Court were to assume jurisdiction over defendant, the Complaint should be dismissed because it fails to state any claims upon which relief can be granted. Indeed, the Complaint's deficiencies in this respect are transparent. Plaintiff has clearly *attempted* to plead 'just enough' facts and vague generalities to create interest in his claims sufficient to sustain them through a dismissal motion. In reality, plaintiff is grasping at straws. Plaintiff identifies no specifics about defendant's actual statements that could establish liability. Moreover, nowhere does the Complaint allege any action of plaintiff that was taken in reliance on defendant's statements, much less that such action damaged plaintiff.

Plaintiff's claim that defendant has "misappropriated plaintiff's name and likeness" is based on defendant's true statements that plaintiff is the "inspiration" for the "Rocky" series. As a matter of well-established law, those statements are a protected 'use' under the First Amendment; repetition of the statements in connection with promotional material is also protected and not actionable. Plaintiff's related unjust enrichment claim, therefore, must also fail, because such a 'use' is anything but 'unjust'. The unjust enrichment claim also fails because plaintiff had no expectation of any benefit from his tenuous connection to defendant that entitles him to this quasi-contractual protection.

Plaintiffs attempt to create a novel and amorphous claim for "Detrimental Reliance" is evidence of his awareness that he cannot sustain a claim under established doctrines such as promissory estoppel. Not only does plaintiff fail to identify a single enforceable promise made by defendant, the Complaint is bereft of any facts that show how plaintiff actually "relied" on defendant's so-called promises, detrimentally or otherwise. In any case, those 'promises' at most comprise an invitation to plaintiff that he audition for a film role, and general statements of future intention to 'work together'. Plaintiff has no more a claim for damages on these facts than if defendant had said, "let's have lunch."

Finally, the Complaint refers to numerous alleged actions or statements of defendant 'over the years,' and a few specific events that took place more than six years before the filing of the Complaint in state court. As a prophylactic matter, defendant seeks a ruling that any of plaintiff's claims that are premised on alleged statements or incidents that took more than six years prior to the filing of the Complaint in state court be stricken based on the applicable statute of limitations.

STATEMENT OF FACTS

This Statement of Facts is taken primarily from the Complaint. The truth of these allegations is not conceded, but is assumed for purposes of that part of the motion made under Fed. R. Civ. Pro. 12(b)(6).

Plaintiff currently is a liquor salesman residing in New Jersey. He formerly was a professional boxer, and was a ranked contender for the heavyweight boxing championship of the world. Complaint, ¶4. Defendant is an actor, writer, director and producer of motion pictures, who resides in California. The series of "Rocky" films is among defendant's best known achievements. Declaration of Sylvester Stallone ("Stallone Dec."), ¶3; Complaint, ¶20.

Plaintiff was a professional boxer in the 1970's, and fought Muhammad Ali in 1975. Plaintiff lost that fight by a technical knockout in the fifteenth round. Complaint, ¶¶6-14. Defendant saw plaintiff fight Ali on closed circuit television, and was inspired to write the script for the first "Rocky" film. According to the Complaint, defendant, in public interviews and in other materials, such as DVDs, has referred to plaintiff as the "inspiration" who provided the "basis" of the "Rocky" character. The Complaint alleges that defendant's mention of plaintiff's name as an "inspiration" constitutes "misappropriation" of plaintiff's rights.[1] *Id.*, ¶¶ 15-17, 21-28

The Complaint further alleges that defendant has made "unfilled promises" to plaintiff concerning various ways by which plaintiff might be compensated for being the inspiration for the "Rocky" films. *Id.*, ¶¶29-31. The Complaint also claims that in 1997, while defendant was filming a movie called "Copland" in New Jersey, plaintiff visited defendant on the set and during that visit defendant told him that they would "work on a project together." *Id.*, ¶32. That visit

[1]The "Facts" section of the complaint does not allege that defendant ever used plaintiff's likeness in any way.

to the set was unannounced. The movie's shooting in New Jersey was completed in October 1997. Stallone Dec., ¶¶ 9-11. Defendant has had no specified contact with New Jersey since. He owns no property here and has no bank accounts here. Defendant paid taxes here in 1998 because of his Copland income, which was earned entirely in 1997. He has not paid taxes here since that time. Stallone Dec., ¶¶ 3-7.

According to the Complaint, the foregoing gives rise to three separate claims for relief: an alleged claim for violation of plaintiff's right of publicity (Count One); an alleged claim for unjust enrichment (Count Two); and an alleged claim for detrimental reliance (Count Three). As we show below, the Complaint should be dismissed for lack of jurisdiction over defendant's person. Alternatively, the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

LEGAL ARGUMENT

POINT ONE

THE COMPLAINT SHOULD BE DISMISSED BECAUSE THIS COURT DOES NOT HAVE *IN PERSONAM* JURISDICTION OVER STALLONE

A. Introduction.

The Complaint alleges only one specific contact between defendant and New Jersey, defendant's participation in the movie "Copland". That movie finished shooting in New Jersey during October 1997, more than six years before this action commenced. Stallone Dec., ¶9-11. The Complaint alleges generally that defendant has made movies distributed nationally and internationally, and has been associated with their promotion. Complaint ¶¶ 18-12. However, there is no allegation of any specific activities that have been directed to New Jersey. These allegations are insufficient as a matter of law for the proper exercise of *in personam* jurisdiction over defendant.

There is clearly a *bona fide* dispute as to whether this Court has jurisdiction over defendant. Under these circumstances: " 'the burden falls upon the plaintiff to illustrate by a preponderance of evidence that the defendant's relationship with the forum state is sufficient for jurisdiction to lie. *IMO Indus., Inc. v. Kiekert AG,* 155 F.3d 254, 257 (3d Cir.1998). In meeting this burden, the plaintiff may not rely on the pleadings, but rather must introduce 'sworn affidavits or other competent evidence.' *Amberson Holdings LLC v. Westside Story Newspaper,* 110 F.Supp.2d 332, 335 (D.N.J.2000) (citations omitted)." Rodi v. Southern New England School of Law, 255 F.Supp.2d 346, 348 (D.N.J. 2003).

Defendant asserts that plaintiff cannot meet this burden, and this Court should grant the motion to dismiss accordingly.

B. The Exercise of Jurisdiction Must Comport With Due Process.

This Court has subject matter jurisdiction based on diversity of citizenship. Accordingly, "[w]hether a federal district court has personal jurisdiction over an out of state [defendant] is governed by the law of the state in which the court sits. *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n,* 819 F.2d 434, 436 (3d Cir.1987)." Rodi, *supra*, 255 F.Supp.2d at 348. New Jersey adheres to well-established principles that require plaintiff to prove that it is constitutionally "fair" for this Court to exercise jurisdiction over defendant, in order to afford him due process of law. In order to meet this burden, plaintiff must satisfy two elements of constitutional fairness. First, defendant must be shown to have sufficient "minimum contacts" with the jurisdiction such that there was a purposeful attempt by him to avail himself of the benefits of the jurisdiction. Contacts due to the fortuitous acts of the plaintiff will not suffice. Second, plaintiff must show that the exercise of jurisdiction is in accord with "traditional notions of fair play and substantial justice...." Blakey v. Continental Airlines, Inc., 164 N.J. 38, 69 (2000).

New Jersey law then applies those two tests to each of the two well-recognized bases for jurisdiction over non-resident defendants: "specific" or "general jurisdiction." The New Jersey courts define them as follows:

> If a cause of action arises directly out of a defendant's contacts with the forum state, the court's jurisdiction is "specific." *Waste Management, Inc. v. Admiral Ins. Co.,*138 *N.J.*106, 119, 649 A.2d 379 (1994); *Lebel v. Everglades Marina, Inc.,*115 *N.J.*317, 322, 558 A.2d 1252 (1989). If, however, the suit is not directly related to the defendant's contacts with the forum state, but is based instead on the defendant's continuous and systematic activities in the forum, then the State's exercise of jurisdiction is "general." *Waste Management, supra,*138 *N.J.*at 119, 649 A.2d 379; *Lebel, supra,*115 *N.J.*at 322, 558 A.2d 1252. [Accura Zeisel Machinery Corp. v. Timco, Inc., 305 N.J.Super. 559, 565 (App. Div. 1997)].

We note at the outset, as we demonstrate *infra*, that the six-year statute of limitations bars any claims based on defendant's purported statement during the "Copland" incident (as well as the vast majority of plaintiff's Complaint). N.J.S.A. 2A:14-1. Time-barred contacts are insufficient to satisfy traditional notions of "fair play and substantial justice" in the jurisdictional context. Respectfully, there would be 'jurisdiction forever' if time-barred contacts were sufficient to enable the court to exercise jurisdiction. That cannot be the law.[2]

We thus analyze the alleged contacts in the Complaint in light of these two tests of constitutional fairness to determine whether the exercise of jurisdiction over defendant would satisfy due process considerations under New Jersey law.

C. Defendant's Extremely Limited Contact With New Jersey Cannot Support Specific Jurisdiction.

Plaintiff's burden to establish specific jurisdiction is as follows:

> the plaintiff must show that his cause of action arose from the defendant's forum-related activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). When claiming that a district court should exercise specific jurisdiction, " 'the relationship among the defendant, the forum and the litigation' is the essential foundation" upon which this finding must rest. *Id.* (quoting *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)). [Rodi, *supra*, 255 F. Supp. 2d at 349].

The "Copland" incident is the only one that plaintiff can point to that connects defendant directly to New Jersey. If anything is clear from plaintiff's vague and conclusory Complaint, it is that defendant's work on "Copland" itself has no relationship to plaintiff's causes of action. The statements attributed to defendant relate to an amorphous suggestion that plaintiff might be part of some future project other than "Copland". Complaint, ¶32. The subject matter of the unannounced meeting on the "Copland" set could have been discussed anywhere. It was merely fortuitous that defendant was in New Jersey when plaintiff unilaterally chose to approach him.

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[2] Our research has found no case where this factor is taken into account in a jurisdictional analysis. This dearth of authority is understandable. Presumably, attorneys are not rushing to bring claims that are both untimely and have doubtful jurisdictional bases. It is also likely that where a defendant addresses both personal jurisdiction and the statute of limitations on motion, one or the other succeeds 'as a threshold matter' and obviates consideration of the remaining issue.

In Lebel v. Everglades Marina, Inc., 115 N.J. 317 (1989), the New Jersey Supreme Court set a 'high bar' for plaintiffs to meet when attempting to assert there is specific jurisdiction over a non-resident. The case concerned allegations of fraud against a Florida boat maker, who sold a boat to a New Jersey resident. We quote the facts at length, because they elucidate the distinction between the manifest basis for finding a sufficient "relationship" to support specific jurisdiction there, and the lack of any such basis here. Justice Handler recounted the facts as follows:

> This case arises from a dispute over the purchase in Florida of a 1987 Cigarette SE 38-foot, high-speed, luxury racing boat. Plaintiff claims to have met a representative of the defendant, Everglades Marina, at the 1984 boat show in New York City. According to plaintiff, over the next two years "on at least twenty occasions" he received in New Jersey phone calls of solicitation from the defendant. There was discussion about price, what features were standard and what were extras on the boat, as well as plaintiff's intention to use the boat in New Jersey. Plaintiff claims that he eventually received and signed in New Jersey a Sales Agreement for the purchase of the boat. In about June of 1986, plaintiff took delivery and registered his boat in Florida. [115 N.J. at 320-321].

The Supreme Court held that the foregoing facts demonstrated both that: a) defendant initiated purposeful contact with the state; and b) asserting personal jurisdiction was in keeping with "fair play and substantial justice." It is noteworthy that despite the Lebel defendant's two year campaign to complete a sale to the New Jersey plaintiff, the Court still noted that: "[o]f course, we realize that this result pushes at the 'outermost limit' of personal jurisdiction." 115 N.J. at 329. The Court concluded that it was fair, in the constitutional sense, for that defendant to be sued here. The Court pointed to the character of the sale, an expensive luxury item, and the persistent sales efforts of that defendant, as factors supporting the 'fairness' of the exercise of jurisdiction. *Id.*

While defendant here purposefully availed himself of the benefits of the State to make Copland in New Jersey, his purpose in creating that contact had nothing to do with plaintiff. The Copland incident had no necessary relationship to this State, and this is precisely the type of "random, fortuitous and attenuated" contact the United States and New Jersey Supreme Courts reject as a basis for specific jurisdiction. *See, e.g.,* 115 N.J at 325 (citing cases). The facts are not even as favorable to plaintiff as those where this Court rejected specific jurisdiction in Rodi, *supra*, concerning Rodi's claims against Southern New England School of Law ("SNESL"):

> Plaintiff cites to only two facts to support specific jurisdiction: a form acknowledgment letter in response to Plaintiff's inquiries about SNESL and an acceptance letter. Plaintiff's claim is that the first letter was sent into New Jersey with the intention of misleading Plaintiff into applying to the law school under the mistaken belief that it would be accredited by the ABA. Plaintiff has done no more to establish Defendant's purposeful conduct. Rather, it appears that Plaintiff sought information about SNESL; in response, Defendant sent a form letter and an application. Thus, SNESL was merely responding to actions taken by Plaintiff. Then, Plaintiff sent the completed application, along with a request to transfer credits from another law school that he had attended. In response, Plaintiff was accepted. Therefore, it appears that Plaintiff is attempting to base specific jurisdiction on the results of his own unilateral actions, rather than on the conduct of Defendant. Since Plaintiff has not identified a specific act that evidences SNESL's intention to "purposely avail itself to the privileges of conducting activities" within New Jersey, this Court cannot find that there have been sufficient minimum contacts to justify an exercise of *in personam* jurisdiction over SNESL. [255 F. Supp. 2d at 350-351].

Judge Rodriguez' analysis in Rodi could very well have been written about this case, except plaintiff here has alleged only "one fact" that connects defendant with this jurisdiction, the making of "Copland."

The fact of the matter is that the isolated and time-barred "Copland" contact cannot in any way be the basis for specific jurisdiction. That contact is part of plaintiff's "Detrimental Reliance" cause of action, which we argue is, in reality, a species of promissory estoppel. In the analogous context where a non-resident has a single *contract* with a resident:

> "If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." [Burger King Corp. v. Rudzewicz] 471 U.S. at 478, 105 S.Ct. at 2185. The *Burger King* Court held the Due Process Clause requires "that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.' " *Id.* at 472, 105 S.Ct. at 2182 (quoting *Shaffer*, 433 U.S. at 218, 97 S.Ct. at 2587 (Stevens, J., concurring)). Absent consent, the "fair warning" condition requires the defendant to purposefully direct its activity toward forum residents, and the injuries at issue in the litigation must relate to the defendant's forum-related activity. *Id.* (citing *Keeton*, 465 U.S. at 774, 104 S.Ct. at 1478; *Helicopteros*, 466 U.S. at 414, 104 S.Ct. at 1872)." [Exton v. Our Farm, Inc., 943 F.Supp. 432, 439 (D.N.J. 1996)].

Defendant was in New Jersey to film a movie that had nothing to do with "Rocky" and nothing to do with plaintiff. While defendant was there, plaintiff decided, without invitation or prior arrangement, to show up on the "Copland" set in the hope of speaking to defendant. It would violate "fair play and substantial justice" for defendant to be 'hailed into court' here because of that contact. Defendant resides in California. The vast majority of plaintiff's allegations have to do with nationwide distribution and marketing of the "Rocky Franchise" and there is no allegation connecting that undertaking with New Jersey. It is certainly not fair that a celebrity who is doing business here for a specific purpose becomes subject to jurisdiction because of a chance encounter with a resident who 'surprises him' on a movie set and turns a general comment into a basis for a claim for damages. Asserting jurisdiction under such tenuous circumstances would hardly encourage out-of-state residents to come to New Jersey to conduct business.

D. There Is No Basis for General Jurisdiction

In the same way that we have demonstrated that plaintiff's claim cannot rest on specific jurisdiction grounds, any claim of general jurisdiction must also fail. In this case, "the claim arises from defendant's non-forum related activities." Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 541 (3d Cir. 1985). The Third Circuit in Gehling, *supra*, cited its prior holding that, under such circumstances: "the plaintiff must demonstrate that in other respects (other than contacts related to the claim itself) the defendant has maintained 'continuous and substantial' forum affiliations." Reliance Steel Products v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 588 (3d Cir.1982) (citing International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Defendant's Declaration demonstrates that he has no "continuous and substantial forum affiliations" with New Jersey.

The Complaint fails to identify any particular focus or connection with New Jersey, and the generalized merchandising and promotional activities in connection with the "Rocky Franchise" that are pleaded simply cannot supply a basis for general jurisdiction here. In Giangola v. Walt Disney World Co., 753 F.Supp. 148 (D.N.J. 1990), a New Jersey resident who was injured at EPCOT in Florida, claimed that advertising in a New Jersey newspaper 'swayed' her decision to go there. In rejecting Giangola's general jurisdiction claim, Judge Debevoise explained:

> [t]he question presented is whether advertising can constitute minimum contacts in satisfaction of the requirements of due process. I find that they do not. *See Scheidt v. Young*, 389 F.2d 58, 60 (3d Cir.1968); *Wright v. American Standard, Inc.*, 637 F.Supp. 241, 244 (E.D.Pa.1985); *cf. Hendrickson v. Reg O Co.*, 657 F.2d 9, 13 (3d Cir.1981); *Rutherford v. Sherburne Corp.*, 616 F.Supp. 1456, 1460-61 (D.N.J.1985). The record shows no direct contact between plaintiffs and agents of the defendant in New Jersey. No negotiations were conducted or agreements executed in New Jersey by defendant or its agents or representatives. No communications are alleged to have been directed to plaintiffs individually, or

> alleged to have induced plaintiffs to contact specific agents of the defendant, in or out of the forum state. *See Scheidt,* 389 F.2d at 60; *Wright,* 637 F.Supp. at 244; *cf. Hendrickson,* 657 F.2d at 13; *Vencedor Mfg. Co. v. Gougler Industries, Inc.,* 557 F.2d 886, 891 (1st Cir.1977). The advertisements were not in the form of direct mail solicitations but were merely to spread knowledge of defendant's facilities among the general public. [753 F. Supp. at 155-156].

There is no evidence that the promotional activities for the "Rocky Franchise" have anything to do with either party's contacts with New Jersey or the subject matter of the litigation. Nor is there any evidence that defendant had continuous, systematic, and substantial contacts with New Jersey in connection with the "Rocky Franchise." Giangola, *supra*, rejects the notion that advertising alone, without specific activity directed to the forum state, can support jurisdiction. *See, e.g.,* Jacobs v. Walt Disney World Co., 309 N.J.Super. 443 (App. Div. 1998). Similarly, the Court in Weinstein v. Todd Marine Enterprises, Inc., 115 F.Supp.2d 668, 673-674 (E.D.Va. 2000), refused to assume general jurisdiction over a New Jersey business whose national magazine advertisements appeared in Virginia because the mere appearance of the advertisements alone, without any more interaction between defendant, plaintiff and the forum, did not show continuous contact with Virginia.

New Jersey happens to be just one of fifty states where the "Rocky Franchise" is on display. The only connection between the forum and defendant is the fortuity that plaintiff lives here. This cannot support general jurisdiction.

POINT TWO

PLAINTIFF'S CLAIM THAT DEFENDANT VIOLATED HIS RIGHT OF PUBLICITY SHOULD BE DISMISSED

Even if defendant were subject to personal jurisdiction in New Jersey, and we have shown that he is not, the Court should dismiss the Complaint, pursuant to Fed. R. Civ. Pro. 12(b)(6), for failure to state a claim upon which relief can be granted.

A. Applicable Legal Standard

A complaint should be dismissed when it is shown that "the facts alleged in the complaint, even if true, fail to support the claim." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). While the Court must accept the allegations in the complaint as true, the complaint should be dismissed if "no relief could be granted under any set of facts that could be proved." Unger v. National Residents Matching Program, 928 F.2d 1392-, 1394-95 (3d Cir. 1991); *see also*, Dykes v. Southeastern Pennsylvania Transp. Auth., 68 F.3d 1564, 1565, n. 1 (3d Cir. 1995).

Plaintiff's Complaint rests on the allegations (i) that the "Rocky" movies were inspired by the circumstances surrounding plaintiff's fight with Muhammad Ali in 1975; and (ii) that defendant has publicly stated, in connection with promotion of the films, that they were inspired by plaintiff's bout with Ali. As shown below, even assuming the truth of those allegations, the pleading still fails to state a claim as a matter of law. The motion to dismiss should be granted.

B. The First Cause of Action, for Alleged Violation of the Right of Publicity, Should Be Dismissed.

The First Count in the Complaint alleges that defendant made statements, in connection with the promotion of the "Rocky" films, to the effect that the "Rocky" character was "inspired" by plaintiff's life, and that this "use" of plaintiff's name constituted a violation of plaintiff's right of publicity.[3]

Plaintiff, therefore, is not claiming that defendant violated his right of publicity because the character of "Rocky" was based on plaintiff. Plaintiff obviously recognizes that such "inspiration" is protected by the First Amendment. *See, e.g.*, Sidis v. F-R Pub.Corp., 113 F.2d 806, 807 (2d Cir. 1940); Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc.2d 1, 294 N.Y.S.2d 122 (1968), *aff'd*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1st Dep't 1969); Cher v. Forum, Internat'l, Inc., 692 F.2d 634 (9th Cir. 1982), *cert. den.*, 462 U.S.1120 (1983); Guglielmi v. Spelling-Goldberg Productions, Inc., 25 Cal.3d 860, 873 (1979); Matthews v. Wozencraft, 15 F.3d 432, 439 (5th Cir. 1994).

Rather, in an effort to avoid the holdings of the above authorities, plaintiff alleges that defendant, in connection with efforts to promote the "Rocky" films, did not have the right to advise the public that plaintiff's life was the inspiration for the character. Plaintiff does not claim that defendant has made an untrue statement about plaintiff. He merely alleges that defendant has truthfully stated that the "Rocky" character was inspired by plaintiff's fight with Muhammad Ali. This allegation does not state a claim because defendant has the First Amendment right to make truthful statements to the effect that plaintiff's life was an inspiration for the "Rocky" character.

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[3]As noted above, the "Facts" portion of the Complaint alleges misappropriation of plaintiff's name, and does not claim misappropriation of plaintiff's "likeness." The "Counts" in the Complaint, however, state that plaintiff's likeness has been misappropriated as well. Since the "Facts" portion gives no support for these statements, we assume that this was an error in drafting and that plaintiff is not claiming his "likeness" was misused. If he is making such a claim, however, that adds nothing to his Complaint. The authorities discussed below make that clear.

Although New Jersey recognizes a common law right of publicity (*see, e.g.* Canessa v. J. I. Kislak, Inc., 97 N.J.Super. 327 (Law Div. 1967)), our research has not disclosed a New Jersey case specifically discussing the issue presented here: whether that right is violated by the mention of a person's name with respect to the promotion of material protected under the First Amendment. In these circumstances, this Court will seek guidance from decisions of other jurisdictions that have discussed the issue. Gruber v. Owens-Illinois, Inc., 899 F.2d 1366, 1369 (3d Cir. 1990). We respectfully submit that, in the absence of New Jersey authority to the contrary, this Court should accept the reasoning of the cases discussed immediately below.[4]

Cher v. Forum Internat'l, Inc., *supra*, is directly on point. The Ninth Circuit Court of Appeals held in that case that the use of the celebrity "Cher's" name to advertise the content of a protected publication was similarly protected under the First Amendment:

> Constitutional protection extends to the truthful use of a public figure's name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication. [692 F. 2d at 639].

The Ninth Circuit cited Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1st Dep't 1975), *aff'd*, 39 N.Y.2d 897, 386 N.Y.S.2d 397 (1976). There, the sports icon Joe Namath sought damages for the unauthorized use of his photograph from earlier Sports Illustrated issues in advertisements promoting subscriptions to Sports Illustrated. The action was dismissed on motion, which dismissal was affirmed on appeal. The New York Appellate Division, interpreting New York's statutory provisions governing the right of privacy, held that:

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[4] In this connection, we wish to advise the Court that we do not concede that New Jersey law governs here. As shown above, defendant resides in California (Stallone Decl., ¶3). We submit that, if the Court finds that a conflict exists between California and New Jersey law, it should apply California law. However, since as shown in the accompanying text, it does not appear that the New Jersey courts have addressed the issue presented in this case, there is no conflict, and we respectfully request the Court accept the authorities cited herein.

"The use of plaintiff's photograph was merely incidental advertising of defendant's magazine in which plaintiff had earlier been properly and fairly depicted and, hence, it was not violative of the Civil Rights Law." 371 N.Y.S. 2d at 11.

Here, plaintiff does not contend that defendant did not have a First Amendment right to draw upon aspects of plaintiff's life in the "Rocky" films. Indeed, plaintiff impliedly concedes (as he must) that defendant was legally entitled to draw inspiration for the "Rocky" character from plaintiff's life and the facts surrounding his title bout with Muhammad Ali. It follows, therefore, that defendant also had (and continues to have) the right, equally protected by the First Amendment, to publicly state that plaintiff's life was an inspiration for the "Rocky" character. The statements on which plaintiff purports to base his claim were, as the Court held in Cher, *supra*, "merely an adjunct of the protected publication." Plaintiff cannot state a claim for violation of the right of publicity, and the First Count of the Complaint must be dismissed.

POINT THREE

PLAINTIFF'S UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED

The Second Count of the Complaint alleges that defendant has been unjustly enriched by the purported misappropriation of plaintiff's name and likeness.[5] This Count fails to state a claim as well.

This issue has been disposed of by the decision in Prima v. Darden Restaurants, Inc., 78 F.Supp.2d 337 (D.N.J. 2000). In Prima, widow of the deceased musician Louis Prima sued the producers of a restaurant commercial, and alleged that the performer in the commercial wrongfully imitated Mr. Prima's style. Mrs. Prima asserted several claims for relief, among them, a claim for unjust enrichment. This Court granted the restaurant's motion to dismiss this claim. This Court held that in New Jersey:

> the tort of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." *Eli Lilly and Co. v. Roussel Corp.,* 23 F.Supp.2d 460, 496 (D.N.J.1998) (citing *Callano v. Oakwood Park Homes Corp.,* 91 N.J.Super. 105, 108, 219 A.2d 332 (App.Div.1966)). "To assert a claim of unjust enrichment a plaintiff must show that 'it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.' " *Id.* (quoting *VRG Corp. v. GKN Realty,* 135 N.J. 539, 554, 641 A.2d 519 (1994)). [78 F.Supp.3d at 355].

This Court then held that Mrs. Prima had not alleged that she (or her late husband) performed or otherwise conferred a benefit on the restaurant under a contractual or quasi-contractual relationship, with the expectation of payment. This Court dismissed the Prima claim and the present case before this Court is similarly deficient. There is no claim by plaintiff here that he conferred a benefit on defendant, under circumstances where he expected payment.

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[5]We note again that the "Facts" portion of the complaint make no mention of alleged misuse of plaintiff's "likeness."

Plaintiff performed no services for defendant. Plaintiff alleges only that defendant used his name in connection with promotion of the "Rocky" films. Under Prima, the Count for alleged unjust enrichment must be dismissed.

POINT FOUR

PLAINTIFF'S "DETRIMENTAL RELIANCE" CAUSE OF ACTION SHOULD BE DISMISSED

New Jersey law recognizes no independent cause of action for the claim of "Detrimental Reliance" set forth in plaintiff's Third Count. Plaintiff is clearly aware of, and is seeking to avoid, the requirements of the New Jersey law of promissory estoppel that are applied in this Court.

In order to plead a viable claim for promissory estoppel, plaintiff must allege that: (1) there was a clear and definite promise by the promisor, (2) the promise was made with the expectation that the promisee would rely thereon, (3) the promisee in fact reasonably relied on the promise, and (4) detriment of a definite and substantial nature was incurred in reliance on the promise. Del Sontro v. Cendant Corp., 223 F.Supp.2d 563 574, 575 (D.N.J. 2002). Here, plaintiff's vague, conclusory and (as we show below) untimely allegations do not satisfy these prerequisites of New Jersey law, which failure includes a complete lack of factual support for a claim of "Detrimental Reliance".

A. Plaintiff Fails to Allege a "Clear and Definite Promise."

A claim for promissory estoppel cannot be based on "[i]ndefinite promises or promises subject to change by the promisor." Del Sontro, *supra*, 223 F.Supp. at 574. Even assuming the truth of the Complaint's allegations, a cursory examination of them reveals that there can be no liability.

First, Plaintiff alleges that defendant invited plaintiff to come to Philadelphia to "read" for a part in the "Rocky II" movie. Plaintiff did so, but alleges now that the part was cut out of the film. Complaint, ¶30. By definition, an audition is no more than a "trial hearing or viewing of an application for employment as a singer, actor, etc." Shorter Oxford English Dictionary, "Audition", p. 149 (5th Ed. 2002). Yet, a commitment in the form of a formal offer, or an intentionally induced substantial detriment in nearly-complete negotiations, is the kind of 'meat' necessary to sustain a promissory estoppel claim. *See,* Peck v. Imedia, 293 N.J.Super. 151 (App. Div. 1996) (offer accepted, later rescinded by employer after substantial detriment was incurred); Pop's Cones, Inc., T/A TCBY Yogurt V. Resorts International Hotel, Inc., 307 N.J. Super. 461 (App. Div 1998) (lease negotiations all but completed, lessor induced substantial reliance and then 'backed-out'). The 'bare bones' of an interview or audition do not suffice.

Plaintiff alleges that "as far as the Rocky Franchise is concerned, defendant has stated to Wepner, 'there will be something in this for you.'" Complaint, ¶31. Similarly, regarding the "Copland" visit, defendant is alleged to have said that he was "working on something" for plaintiff, and that they would "'work together on a project' in the near future.'" Complaint, ¶32. These statements, even assuming their truth, are virtual antonyms to "clear and definite". Vague statements about doing "something" together in the future, by definition, are indefinite.

B. There is No Basis to Believe Defendant Expected Plaintiff to Rely.

Assuming, *arguendo*, that the allegations of the Complaint are true, defendant merely made general statements to plaintiff that reveal no intention whatsoever by defendant that plaintiff rely on them. There simply is no reference to any fact that would suggest that reliance was expected or reasonable. In each instance, defendant is making general statements about some possible future action or event that are insufficient as a matter of law to support a promissory estoppel claim. This Court explained the law as follows:

> [a]s the Third Circuit has held "the reliance upon a mere expression of future intention cannot be 'reasonable,' because such expressions do not constitute a sufficiently definite promise." *See In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236, 1250 (3d Cir.1989)(*quoting Santoni v. Fed. Deposit Ins. Corp.*, 677 F.2d 174, 179 (1st Cir.1982)). " '[A] truthful statement as to the present intention of a party with regard to his future acts is not the foundation upon which an estoppel may be built. The intention is subject to change.' " *Derry Finance N.V. v. Christiana Cos., Inc.*, 616 F.Supp. 544, 550 (D.Del.1985), (*quoting Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 130 N.E. 295, 298 (1921)), *aff'd*, 797 F.2d 1210 (3d Cir.1986). [Del Sontro, *supra*, 223 F.Supp. 2d at 576].

Plaintiff has not alleged that defendant made statements that are even close to those that have been held to create a reasonable expectation of reliance. For example, in Pop's Cones, *supra*, plaintiff's negotiations with defendant Resorts for a lease on a new location for plaintiff's TCBY store went on for months to a point where they were "95% complete". Pop's Cones asked Resorts whether it should renew its existing lease or prepare to move, and Resorts said " '*not* to renew the lease' and to 'pack up the Margate store and plan on moving.' " Pop's Cones did just that, and put its equipment in temporary storage and made site preparations. Ultimately, Resorts leased the space to another TCBY franchisee. The Appellate Division held that Resorts "should reasonably have expected to induce action or forbearance on the part of plaintiff to his precise instruction…." 307 N.J.Super. at 472.

Similarly, a claim for promissory estoppel was sustained in Peck v. Imedia, *supra*, because once Peck had accepted Imedia's offer of employment in New Jersey, she closed her business in Boston and made other costly arrangements to relocate here. It is obvious that her new employer would have reasonably expected these significant steps to have been taken, but it nonetheless rescinded the job offer. The Court held that Imedia's promise of employment reasonably induced Peck's reliance. 293 N.J.Super. at 167-168. Plaintiff sets forth no comparable words or conduct by defendant in the present Complaint that even approach the facts in the foregoing cases.

C. Plaintiff Makes No Cognizable Allegation of Reliance.

The Complaint is void of specific facts demonstrating that plaintiff relied on any statements that defendant allegedly made; let alone that any reliance was detrimental to plaintiff. To the extent that plaintiff even pleads reliance, he does so in conclusory fashion: "Throughout the years, Wepner has relied on defendant's numerous and repeated promises of some sort of compensation." Complaint, ¶34. This Court, affirming Magistrate Judge Hedges, has held that conclusory allegations of this type are insufficient to withstand a motion to dismiss: "Rule 8 of the Federal Rules of Civil Procedure further requires that in a pleading, 'facts must be stated, rather than legal conclusions unsupported by facts....' Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure;* § 1216 at 152 (2d ed. 1990). A complaint's 'bald assertions' or 'legal conclusions' do not need to be credited when deciding a motion to dismiss. *Morse v. Lower Merion School District,* 132 F.3d 902, 906 (3d Cir.1997)." Krantz v. Prudential Investments Fund Management LLC, 77 F.Supp.2d 559, 563 (D.N.J. 1999), *aff'd.*, 305 F.3d 140 (3rd Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003). Thus, plaintiff has failed to plead a legally cognizable claim for reliance that is central to his self-styled cause of action.[6]

[6] We suspect that plaintiff will attempt to remedy these deficiencies by stating: 'I will amend.' However, the mere claim that an amendment can be proposed, in the absence of the actual proposed pleading, should not deter the Court from dismissing the case. As the New Jersey Supreme Court stated, interpreting its cognate Rules: "Neither the trial court nor the opposing party can be forced to buy a pig in a poke in the shape of an undisclosed amendment." Grobart v. Society for Establishing Useful Manufactures, 2 N.J. 136, 146 (1949).

D. Plaintiff Alleges No Definite and Substantial Harm from Defendant's Actions.

Plaintiff also fails to allege he has suffered harm of a definite and substantial character due to defendant's actions. Undoubtedly, this is because of the vague nature of the 'promises' he claims to have relied upon. In cases where promissory estoppel has been found, *supra*, the clarity of the promises revealed reasonable expectations that the plaintiffs would act and, indeed, the plaintiffs acted accordingly. In those cases, the "definite and substantial" harm suffered was directly attributable to the inducement proffered.

It has never been the law that an unsuccessful job interview supplies a detriment that can sustain a promissory estoppel claim. Surely, plaintiff's unsuccessful audition is similarly insufficient. Plaintiff also provides no factual basis to connect the 'cutting' of the part in "Rocky II", with any action of defendant. Therefore, even if defendant's 'promise' is legally significant, there would be no causal link to any harm. *See* Complaint, ¶30. Plaintiff cannot allege the required harm because there was none. Nor can he identify a promise sufficient to have induced substantial forbearance on his part. An offer to audition is insufficient to constitute a legally enforceable promise of compensation or employment.

In sum, "[t]he essential justification for the promissory estoppel doctrine is to avoid the substantial hardship or injustice which would result if such a promise were not enforced." Pop's Cones, *supra*, 307 N.J.Super at 469, citing Malaker Corp. Stockholders Protective Committee v. First Jersey Nat. Bank, 163 N.J.Super. 463, 484 (App. Div. 1978), *certif. den.* 79 N.J. 488 (1979). Here, plaintiff has failed to allege any facts that meet the prerequisites for such a claim, or that are synonymous with or similar to those found in the published cases that have considered the doctrine of promissory estoppel.

POINT FIVE

PLAINTIFF'S CLAIMS ACCRUING BEFORE NOVEMBER 12, 1997 SHOULD BE DISMISSED BECAUSE THEY ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Introduction

Plaintiff's claims that accrued before November 12, 1997 are barred by the statute of limitations. In a transparent effort to make it appear as if he still has viable claims for his 'cut' of the "Rocky Franchise", plaintiff has framed the vast majority of its allegations with a minimum of specificity as to when various events referred to in the Complaint actually occurred.

The Complaint contains a number of general allegations that have no specific time frame attached. The very first allegation begins: "Throughout the years including to date…" Complaint, ¶12. Next, plaintiff refers back to the time of the original "Rocky" movie, stating: "Stallone has used, and continues to use, the name of Chuck Wepner…." *Id*, ¶2.

Plaintiff introduces the concept of the "Rocky Franchise" to expand the reach of his claims to include the five "Rocky" films, the first released in 1976, as well as related merchandising and promotions. *Id*., ¶¶ 17-19. With respect to the "Franchise," plaintiff states: "The creation of such products, and the use of plaintiff's name in connection with such products, continues to this day." *Id*, ¶19. Plaintiff makes several similar references intended to demonstrate that defendant's conduct has continued from the time of the first "Rocky" film through today: "Defendant has used, and continues to use, the name of Wepner in the promotion of the *Rocky* Franchise…." *Id*, ¶21. *See also*, ¶24; "Defendant, on repeated occasions throughout the past twenty-eight years…." *Id. ¶ 29;* and "Throughout the years, Wepner has relied on defendant's numerous and repeated promises…." *Id*, ¶34.

Plaintiff does make three allegations about defendant's conduct that can be pinpointed in time. Chronologically, the first concerns the "reading" for the part of "Ching Webber" in "Rocky II". *Id,* ¶30. That film was released in 1979. Stallone Dec., ¶12. The second is the Copland incident. Id, ¶32. That film finished shooting in New Jersey before November 12, 1997. Stallone Dec., ¶ 11. The third is the 2001 "Special Edition" DVD. *Id,* ¶¶23-28.

B. Plaintiff's Claims Are Barred by the Six Year Statute of Limitations.

All of plaintiff's claims allege injuries to property, and the six-year statute of limitations under New Jersey law governs those claims.[7] N.J.S.A. 2A:14-1. This Court has specifically applied that statute to right of publicity claims. Rolax v. Whitman, 175 F.Supp.2d 720, 725-726 (D.N.J. 2001), *aff'd.*, 53 Fed. Appx. 635, 2002 WL 31528790 (3rd Cir. 2002) (Not selected for publication in the Federal Reporter, No. 01-4229). Claims for unjust enrichment are governed by the six-year limitation period as well.. Kopin v. Orange Products, Inc., 67 F.Supp.2d 424, 473 (D.N.J. 1999); Iwanowa v. Ford Motor Co., 297 N.J.Super. 353 (App.Div.), *certif. denied*, 149 N.J. 409 (1997).

It would appear beyond doubt that the six year statute would also apply to promissory estoppel claims because they involve damage to property, not personal injury. For this reason,

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[7] Based on the conflict of laws analysis set forth in connection with our right of publicity arguments, we do not concede that New Jersey law ultimately applies to all facets of this case. We assume for purposes of this motion, based on the facts alleged in the Complaint, that New Jersey law applies to limitations issues. Thus, we discuss the 'longer' (six-year) New Jersey statute of limitations. However, and should any facet of the Complaint survive this motion, we reserve the right to seek application of shorter periods of limitations of other states. Discovery may shed light on where certain of the vaguely described activities in the Complaint actually occurred, potentially changing the analysis for conflicts purposes. *See generally,* Yarchak v. Trek Bicycle Corp., 208 F.Supp.2d 470, 478 at N. 7 (D.N.J. 2002) (discussing New Jersey choice of law rules regarding statutes of limitations).

N.J.S.A. 2A:14-1 controls, in the same way it governs breach of contract actions. *See generally,* Gashlin v. Prudential Ins. Co. of America Retirement, 286 F.Supp.2d 407, 421 (D.N.J. 2003) (applying state six-year statute of limitations to "estoppel" claims). While no New Jersey case has addressed the issue directly, courts applying Pennsylvania, Michigan, Ohio and Connecticut law hold that those state's statutes of limitations applicable to contract claims also govern promissory estoppel claims. Crouse v. Cyclops Industries, 745 A.2d 606, 613 (Pa. 2000); Torringford Farms Assoc., Inc. v. City of Torrington, 816 A.2d 736, 741 (Conn. App. 2003); ATD Corp. v. DaimlerChrysler Corp., 261 F.Supp.2d 887, 894 (E.D. Mich. 2003) (Ohio law); Huhtala v. Travelers Ins. Co., 257 N.W.2d 640, 643-44 (Mich. 1977).

Two of the three specific instances of conduct set forth in the Complaint, the "Copland" and "Rocky II" matters, are clearly barred by the six-year statute of limitations. The statute itself would not apply to the Special Edition DVD claims, though they fail on other grounds. All other claims, to the extent they allege specific acts from the time of the release of the original "Rocky" film in 1976, are barred to the extent they accrued before November 12, 1997.

C. Equitable Tolling or Estoppel to Plead the Statute of Limitations Is Inapplicable Here.

Defendant anticipates that plaintiff is going to claim "some sort" of equitable tolling of the applicable statute of limitations, or an estoppel against defendant, to attempt to save his otherwise vague and time-barred claims. For example, plaintiff alleges that he "relied on defendant's numerous and repeated promises of some sort of compensation. Nevertheless, his trust in defendant has been entirely in vain." Complaint, ¶34. But these equitable 'clock-stopping' doctrines are only "justified if extraordinary circumstances have prevented a plaintiff from asserting his rights and he can show that he exercised reasonable diligence in investigating and bringing his claims." Rolax v. Whitman, *supra,* 175 F.Supp.2d at 728. Courts are reluctant to employ equitable tolling, reserving it for cases where "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Villalobos v. Fava, 342 N.J.Super. 38, 50, (App.Div.2001), quoted in Rolax, *id* at 729.

Plaintiff alleges neither vigilance on his part in pursuing his rights on any occasion, nor recognizable "extraordinary circumstances," that would justify equitable intervention to avoid the statute of limitations. Even assuming, *arguendo,* that the vague allegations set forth in the Complaint made out viable legal claims, plaintiff has not alleged the type of 'misconduct' that mandates application of equitable tolling. *See, e.g.,* Nativo v. Grand Union Co., 315 N.J.Super. 185, 188-189 (App. Div. 1998), *certif. den.*, 158 N.J. 71 (1999)(citing cases). The only facts set forth are defendant's invitation to an audition and vague references to future opportunities. Neither of those compares with the circumstances that would justify equitable relief for plaintiff here.

With respect to any estoppel against pleading the statute, plaintiff fails to allege that defendant made "any representation or engaged in conduct that was calculated to mislead [him] into a misperception concerning the eventual need to resort to litigation or to lull [him] into a false sense of security with respect to [his] right to take judicial action." W.V. Pangborne & Co., Inc. v. New Jersey Dept. of Transp., 116 N.J. 543, 554 (1989). In Pangborne, the plaintiff-contractor alleged that the Department of Transportation was estopped from invoking the statute of limitations against its contract claims. The Supreme Court rejected that estoppel argument despite the fact that DOT's Claims Committee's gave extensive consideration to the contractor's claims even after the contractor had signed a qualified release. The Court found the following considerations unavailing to the contractor:

> (1) the claim had been monitored and verified early in the project by DOT's own representatives; (2) Pangborne had made it clear to DOT that it was not abandoning its claim when it signed a qualified release; (3) the Claims Committee continued to request documents after the release was signed, thus reinforcing Pangborne's impression that the Committee was undertaking a full and comprehensive review; and (4) the Claims Committee took fifteen months to process the claim. [*Id*].

A fortiori, plaintiff's allegations here would be insufficient because he alleges nothing but generalities, as opposed to the extended, formal consideration of the claims that were insufficient to obtain estoppel in Pangborne. Therefore, his claims cannot be saved from the bar of the statute.

D. Plaintiff's Claim of Misplaced "Trust" Does Not Save Time-Barred Claims.

Finally, plaintiff uses the word "trust" to suggest some further equitable consideration that may toll the statute because "his trust in defendant has been entirely in vain." Complaint, ¶34. However, he sets forth no facts to support a relationship of trust with defendant sufficient to support an equitable claim that defendant prevented plaintiff from pursuing his legal rights (such as they may be). At best, plaintiff describes a series of proposals by defendant, made at arms-length, to do business on some unspecified basis concerning the "Rocky Franchise" with which defendant was closely affiliated.

It would be absurd to find a "trust" relationship here in the absence of any facts or special circumstances that suggest anything more than the relationship between author and 'inspiration'. Plaintiff is no more entitled to be in a "trust" relationship to defendant than a debtor is to a creditor, or an insured is to the insurer's agent. *See, e.g.,* United Jersey Bank v. Kensey, 306 N.J.Super. 540, 552-553 (App. Div.), *certif. den.*, 153 N.J. 402 (1997) (debtor-creditor relationship does not create fiduciary duty). This makes sense because, in the context of normal business relations: "[t]o hold otherwise would impose fiduciary obligations on the seller of goods or services in the vast multitude of ordinary arm's-length transactions simply on the basis that the seller possessed superior knowledge of the product being sold." Greenberg v. Life Ins. Co. of Virginia, 177 F.3d 507, 522 (6th Cir 1999) (Ohio law); *accord*, Azar v. Prudential Ins. Co. of America. 68 P.3d 909, 926 (N.M.App.2003).

In any case, plaintiff's Complaint provides no facts that demonstrate he was a "rube" waiting to be taken. While it is alleged that plaintiff's early career as a professional boxer was "part time", the allegations about his contact with defendant took place after plaintiff had fought for the world heavyweight championship and had risen above his "humble beginnings." Complaint, ¶¶6-14. It is clear that plaintiff attempts to establish a "trust" relationship in a futile effort take advantage of the general rule that "[t]he statute of limitations will not begin to run in favor of the trustee of a direct, express, and continuing trust until the trust terminates...." 54 CJS "Limitation," § 184 (Supp. June 2003). But this rule cannot apply here because the facts do not support the existence of any "trust" or a basis to assert that plaintiff was entitled to repose special trust in defendant. Such facts do not exist here.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant defendant's motion to dismiss the Complaint for lack of jurisdiction over defendant's person. Should the Court find that there is jurisdiction, we further request that it dismiss the Complaint because it fails to state a claim upon which relief can be granted.

Respectfully submitted,

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By: ______________________
William D. Sanders (WS 2511)

Dated: January 30, 2004

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